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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 272

EDWARD M. GILBERT,

Petitioner,

—against—

SUPREME COURT OF THE STATE OF NEW YORK, CRIMINAL TERM, COUNTY OF NEW YORK, THE SEVERAL JUDGES THEREOF, Individually and as Judges of the Said Supreme Court, Criminal Term, County of New York, and FRANK S. HOGAN, District Attorney, County of New York, and HIS REPRESENTATIVES,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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on the Brief

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In the

Supreme Court of the United States

October Term, 1965

No. .....

Edward M. Gilbert,

Petitioner,

—against—

Supreme Court of the State of New York, Criminal Term, County of New York, the Several Judges Thereof, Individually and as Judges of the Said Supreme Court, Criminal Term, County of New York, and Frank S. Hogan, District Attorney, County of New York, and His Representatives,

Respondents.

PETITION FOR WRIT OF CERTIORARI

The petitioner prays that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York, dated March 31, 1966, affirming a judgment of the Appellate Division, First Department, Supreme Court of the State of New York, entered on April 13, 1965.

Opinions Below

The Appellate Division, First Department of the Supreme Court of the State of New York, entered an order in the Office of the Clerk of said Court on April 13, 1965. No opinion was rendered.

The Court of Appeals of the State of New York affirmed the order of the Appellate Division without opinion on March 31, 1966.

Jurisdiction

The order of affirmance of the Court of Appeals of the State of New York is dated March 31, 1966. The jurisdiction of this Court is invoked under Title 28, U. S. C. §1257(3).

Questions Presented

1. Should the double jeopardy protection of the Fifth Amendment be extended to the States to bar a State prosecution subsequent to a Federal prosecution for the same offense?

2. Does petitioner's conviction in the Federal Court bar a subsequent State prosecution based on the same acts and same evidence?

Statutory Provisions Involved

1. United States Constitution, Fifth Amendment:

"* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;"

2. New York State Constitution, Article 1, Section 6:

"No person shall be subject to be twice put in jeopardy of the same offense."

3. Title 18, U. S. C. §1343. Fraud by wire, radio or television.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

4. New York Penal Law, §1290:

"A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, thing in action, evidence of debt or contract, or article of value

of any kind, steals such property and is guilty of larceny.

"Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that:

"1. The accused obtained possession of, or title to, such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing; or

"3. The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property, or with possession as well as title."

5. New York Penal Law, §1294: Grand Larceny in first degree.

"A person is guilty of grand larceny in the first degree, who steals, or unlawfully obtains or appropriates, in any manner specified in this article:

"Subd. 3

"Property of the value of more than five hundred dollars, in any manner whatever."

6. New York Penal Law, §33: Foreign conviction or acquittal a defense.

"Whenever it appears upon the trial of an indictment, that the offense was committed in another state or country, or under such circumstances that the courts of this state or government had jurisdiction thereof, and that the defendant has already been ac-

quitted or convicted on the merits upon a criminal prosecution under the laws of such state, or country, founded upon the act or omission in respect to which he is upon trial, such former acquittal or conviction is a sufficient defense."

7. New York Code of Criminal Procedure, §139. Conviction or acquittal in another state, a bar, where the jurisdiction is concurrent.

"When an act charged as a crime is within the jurisdiction of another state, territory or country, as well as within the jurisdiction of this state, a conviction or acquittal thereof in the former, is a bar to a prosecution or indictment thereof in this state."

STATEMENT

Prior Proceedings

On June 28, 1962, a fifteen-count indictment, in which the petitioner was charged with misappropriation of corporate funds and violations of the Securities laws, was filed in the United States District Court for the Southern District of New York (R. 13*). Thereafter, on July 9, 1962, a twelve-count indictment, in which petitioner was charged with grand larceny in the first degree, was filed in the Court of General Sessions, County of New York (R. 20).

Petitioner pleaded not guilty to both indictments on October 29, 1962. On September 25, 1964, petitioner withdrew his plea of not guilty in the Federal Court and entered a plea of guilty to Counts 1, 5 and 7 of that indictment. Petitioner is awaiting sentence on that plea.

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* References are to pages in certified Record on Appeal.

On October 9, 1964, petitioner, in the State Court case, entered the additional plea of not guilty by reason of previous conviction. Thereafter, petitioner moved in the Supreme Court, New York County, for an order pursuant to Section 139 of the Code of Criminal Procedure and Section 33 of the Penal Law, dismissing the State Court indictment. This motion was denied on November 6, 1964, by the Honorable Thomas Dickens (R. 26).

By notice of motion directed to the Judges of the Supreme Court of the State of New York and the District Attorney of the County of New York, petitioner moved before the Supreme Court, Appellate Division, First Department, for an order pursuant to Article 78 of the Civil Practice Laws and Rules, prohibiting the respondents from proceeding in any manner on Indictment No. 2688-62 (R. 5). The petition was denied by order dated April 13, 1965 (R. 3). No opinion was rendered.

Thereafter, on November 3, 1965, petitioner appealed the denial of his petition to the Court of Appeals of the State of New York (R. 45). On March 31, 1966, the Court of Appeals of the State of New York affirmed the order of the Appellate Division, First Department (R. 47). On April 18, 1966, the order of the Court of Appeals of the State of New York was made the order and judgment of the Appellate Division, First Department (R. 48, 49).

Statement of Facts

In the latter part of 1961, when petitioner was the President of E. L. Bruce Company (Incorporated) (hereinafter referred to as "Bruce"), he discussed the desirability of the acquisition of Celotex Corporation (hereinafter referred to as "Celotex") with members of the Bruce Board of Directors. It was agreed that the acquisition of Celotex by Bruce was a desirable corporate end. In order to advance the acquisition, petitioner personally undertook, through the instrumentality of his wholly-owned corporation, Rhodes Enterprises, Inc., the purchase of large numbers of Celotex shares on margin. Petitioner also entered into a written agreement with Bruce, whereby Bruce was given the option to purchase such Celotex shares at the same price petitioner had paid for them (R. 7).

On May 28, 1962, the stock market suffered a severe break. Petitioner was beset with margin calls and threats to sell him out if these calls were not met promptly. In order to preserve the situation, between May 29 and June 6, 1962, petitioner instructed the Secretary of Bruce to draw a number of checks, payable either to Rhodes Enterprises or to Empire Hardwood Flooring (R. 7, 8).

Empire Hardwood Flooring was acquired in 1960 by a company known as Empire National. In 1961 Empire National was merged into Bruce and control of Empire Hardwood Flooring passed to Bruce (R. 9).

Count 1 of the Federal indictment, to which petitioner has pleaded guilty, charges that " . . . without authorization of Bruce and for his own use, benefit and unjust enrichment [petitioner] would cause monies and funds of Bruce aggregating $1,953,000 to be transferred to Rhodes Enter-

prises, Inc. . . . and Empire Hardwood Flooring Corporation . . . " (R. 13).

Although the petitioner pleaded guilty to Count 1 of the Federal indictment, the supporting affidavit of Assistant United States Attorney Michael F. Armstrong (R. 35) discloses that trial of that count would have shown that petitioner caused unauthorized withdrawals from Bruce of $1,958,000. Further, of this amount petitioner caused $1,553,000 to be transferred to Rhodes Enterprises and $405,000 to be transferred to Empire Hardwood of which $5,000 was returned to Bruce and the total unauthorized withdrawals thus aggregated $1,953,000 (R. 36).

The Armstrong affidavit further states that certain checks of Bruce would have been introduced in support of the charge in Count 1 (R. 36). A comparison between these checks and the checks which serve as the basis for the State Court indictment discloses that they are identical. The checks listed in the Armstrong affidavit and the related counts in the State Court indictment are as follows:

Date	*Amount*	*Payable to*	*State Court Indictment*
May 28, 1962	$ 50,000	Rhodes Enterprises, Inc.	Count 1
May 29, 1962	340,000	Rhodes Enterprises, Inc.	Count 5
May 29, 1962	200,000	Empire Hardwood Flooring	Count 11
May 29, 1962	205,000	Empire Hardwood Flooring	Count 12
June 1, 1962	490,000	Rhodes Enterprises, Inc.	Count 6
June 1, 1962	126,000	Rhodes Enterprises, Inc.	Count 7
June 5, 1962	100,000	Rhodes Enterprises, Inc.	Count 8
June 6, 1962	160,000	Rhodes Enterprises, Inc.	Count 9
June 6, 1962	287,000	Rhodes Enterprises, Inc.	Count 10 (R. 36)

The two withdrawals from Bruce on May 29, 1962 totaling $405,000 and made payable to Empire Hardwood Flooring (Counts 11 and 12 of the State indictment), repre-

sent the same funds withdrawn from Empire on the same date, made payable to Jerome International and Rhodes Enterprises (Counts 2, 3 and 4 of the State indictment). However, because Bruce and Empire were in fact the same, the withdrawal of funds became unauthorized with the transfer from Empire to Jerome International and Rhodes Enterprises and not with the transfer from Bruce to Empire. The withdrawals from Empire total $400,000 and the remaining $5,000 was subsequently transferred to the Bruce account by means of an inter-corporate transaction. Thus, the unauthorized withdrawals are represented by Counts 2, 3 and 4 of the State indictment (transfers from Empire), thereby rendering Counts 11 and 12 duplicitous (transfers from Bruce to Empire) (R. 9).

The total amount of unauthorized withdrawals which would have been proven under Count 1 of the Federal indictment is $1,953,000 (R. 36). This is precisely the amount, alleged in Counts 1 through 10 of the State indictment. Furthermore, the checks of Bruce representing the unauthorized withdrawals, which would have been introduced on the trial of Count 1 of the Federal indictment in support of that charge, are identical with the checks relied upon by the State in support of the State indictment (R. 36, 38).

The respondent Frank S. Hogan, District Attorney of New York County, by his representative Assistant District Attorney Jerome Kidder, has moved the pending State indictment for trial and has opposed petitioner's motion for a dismissal of the indictment in the Supreme Court (R. 11, 12).

Petitioner has been placed in jeopardy for the acts of misappropriating $1,953,000 from Bruce during May and

June, 1962, by virtue of his plea of guilty to Count 1 of the Federal indictment. The acts of the petitioner and the evidence to support the Federal charge are identical with the acts and evidence involved in the State proceeding. This is undisputed. The respondents are attempting to place petitioner in double jeopardy in violation of his constitutional rights.

Reasons for Granting the Writ

The decision below should be reviewed because it will require the petitioner to stand trial in the Supreme Court of the State of New York for a crime to which he has already pleaded guilty in the United States District Court for the Southern District of New York, thus violating petitioner's constitutional rights.

In *Bartkus* v. *Illinois*, 359 U. S. 121, 79 S. Ct. 676 (1959), this Court held that a state prosecution following a Federal prosecution for the same offense was not barred by the Fourteenth Amendment to the Constitution. Relying in part on the earlier decision in *Palko* v. *Connecticut*, 302 U. S. 319, 58 S. Ct. 149 (1937), the Court held at 359 U. S. 124:

> "We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such."

Following this Court's 5-4 decision in *Bartkus, supra*, several cases were decided in which a number of constitutional safeguards enumerated in the first eight Amendments were extended to the States. These decisions

include *Mapp* v. *Ohio,* 367 U. S. 643, 81 S. Ct. 1684 (1961), search and seizure; *Robinson* v. *California,* 370 U. S. 660, 82 S. Ct. 1417 (1962), cruel and unusual punishment; *Gideon* v. *Wainright,* 372 U. S. 335, 83 S. Ct. 792 (1963), right to counsel; *Malloy* v. *Hogan,* 378 U. S. 1, 84 S. Ct. 1489 (1964), self-incrimination; *Pointer* v. *Texas,* 380 U. S. 400, 85 S. Ct. 1065 (1965), right of confrontation.

Although none of these decisions deals with the constitutional issue raised in *Bartkus, supra,* to wit: whether or not the double jeopardy protection of the Fifth Amendment shall be binding on the states, that precise issue was recently raised in *Cichos* v. *Indiana,* —— U. S. ——, 86 S. Ct. 1270 (1966) in which this Court has granted certiorari.

See also:

United States ex rel. Hetenyi v. *Wilkins,* 348 F. 2d 844 (2nd Cir. 1965).

The questions raised in *Cichos, supra,* are: (1) Is the Fifth Amendment's protection against double jeopardy of such basic characteristic in law as to be immune, under the Fourteenth Amendment, from state encroachment? (2) Should *Palko* v. *Connecticut,* 302 U. S. 319, 58 S. Ct. 149 (1937), be reconsidered and overruled? 34 U. S. Law Week 3258.

The Court of Appeals for the Second Circuit has held in *United States ex rel. Hetenyi* v. *Wilkins,* 348 F. 2d 844 (2nd Cir. 1965), that the Due Process Clause of the Fourteenth Amendment imposes some limitations on the powers of the States to reprosecute an individual for the same crime. This issue is now before this Court in *Cichos, supra,* which has not been decided as of the writing of this petition.

While petitioner cannot anticipate the decisions of this Court, it is submitted that the well reasoned opinion of the Second Circuit in *Hetenyi, supra,* should be considered by this Court in extending the protection of the Fifth Amendment to state prosecutions.

It is recognized that both *Cichos, supra,* and *Hetenyi, supra,* deal with reprosecutions by a State for crimes for which those defendants had been previously tried. In the instant matter, the issue involves a subsequent State prosecution following a conviction by way of a plea of guilty, in Federal Court.

Should this Court determine that the Fifth Amendment protection against double jeopardy is binding on the States, at least to the extent that a State may be barred from reprosecution for the same crime, it is submitted that this determination should similarly be extended to a subsequent State prosecution following a Federal prosecution for the same crime.

Such a determination would necessarily require a reconsideration and overruling of the holding in *Bartkus* v. *Illinois,* 359 U. S. 121, 79 S. Ct. 676 (1959).

Although both *Cichos, supra,* and *Hetenyi, supra,* deal with subsequent prosecutions by the same sovereign, it is submitted that once having extended the Fifth Amendment protection against double jeopardy to be binding on the States, it must follow that the distinction between prosecutions by different sovereigns must fall.

As stated by Mr. Justice Black in his dissenting opinion in *Bartkus, supra,* at 359 U. S. 155:

> "The Court apparently takes the position that a second trial for the same act is somehow less offensive

> if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one. If the danger to the innocent is emphasized, that danger is surely no less when the power of the State and Federal Governments is brought to bear on the man in two trials, than when one of these 'Sovereigns' proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct."

If the protection of the Fifth Amendment against double jeopardy is so fundamental as to be immune under the Fourteenth Amendment from State encroachment, then such protection must necessarily be extended not only to reprosecutions by the State but to State prosecutions subsequent to Federal prosecutions as well.

Should the Court extend the protection of the Fifth Amendment to State prosecutions subsequent to Federal prosecutions for the same offense, the next question to be decided is whether or not petitioner will be placed in jeopardy twice if he is tried in the New York Court.

Petitioner argued both before the Appellate Division of the Supreme Court and the Court of Appeals that his prosecution in the State Court was barred by the State Constitution (Article 1, Section 6) and statutes (New York Penal Law, Section 33 and Code of Criminal Procedure, Section 139). Petitioner's arguments were rejected by the Appellate Division which denied the writ of prohibition and by the Court of Appeals which affirmed the order of the Appellate Division.

The test to be applied in determining the validity of a claim of double jeopardy is a question which has vexed courts in both the Federal and State jurisdictions. In *Morgan* v. *Devine,* 237 U. S. 632, 35 S. Ct. 712 (1915), this Court laid down the following test (at p. 641):

> "As to the contention of double jeopardy upon which the petition of habeas corpus is rested in this case, this Court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; * * *."

This has been applied by other Federal courts. In *United States* v. *Kramer,* 289 F. 2d 909 (2nd Cir. 1961), the Court held (at p. 913):

> "Offenses are not the same for purposes of the double jeopardy clause simply because they arise out of the same general course of criminal conduct; they are the 'same' only when 'the same evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other.'"

In the recent case of *Arnold* v. *United States,* 336 F. 2d 347 (9th Cir. 1964), the Court stated (at p. 349):

> "The test most often cited in resolving the question of identity of offenses is: is proof of the matter set out in a second indictment admissible as evidence under the first indictment, and could a conviction have been properly sustained on such evidence? If the answer is yes, then the plea is sufficient; otherwise it is not."

See also:

Waters v. *United States*, 328 F. 2d 739 (10th Cir. 1964).

It is respectfully submitted that the same evidence would be required to sustain the State prosecution as would be required to sustain the Federal prosecution.

To sustain its burden of proof, the State would show that petitioner, without authority, caused sums of money to be transferred from Bruce and would offer in evidence the checks drawn on the Bruce account to support each of the counts of the indictment.

The attention of the Court is respectfully directed to the affidavit of Assistant United States Attorney Michael F. Armstrong (R. 35). Therein, the Federal prosecutor states that the trial of Count 1 of the Federal indictment would have shown that petitioner caused unauthorized withdrawals from Bruce. The total amount of these unauthorized withdrawals, $1,953,000, is precisely the same amount as alleged in the State indictment after elimination of the duplicitous counts. The Federal prosecutor further states that nine checks on the Bruce account would have been introduced in support of the charge in Count 1 of the Federal indictment. These are the identical checks which the State would introduce in support of Counts 1 and 5 through 12 of the State indictment. As already indicated, the misappropriation of funds alleged in Counts 11 and 12 of the State indictment are identical with the funds alleged in Counts 2, 3 and 4 of that indictment.

Thus, in both the State and Federal prosecutions the proof would show that petitioner caused unauthorized withdrawals of $1,953,000 from Bruce and that he transferred the funds. Each would offer the identical documentary

proof to support the charges. Therefore, not only would the evidence necessary to convict in the State prosecution be admissible under the Federal indictment, the evidence used to prove both sets of charges would in fact be identical.

It is respectfully submitted that the Armstrong affidavit makes it abundantly clear that proof of the larceny was a material element in the Federal prosecution and the Federal Government would have proven Count 1 of its indictment with precisely the identical proof the State will offer to prove its own indictment.

Reduced to its basic terms, Count 1 of the Federal indictment alleges that the petitioner fraudulently obtained from E. L. Bruce Co. the sum of $1,953,000; similarly, the State indictment alleges the identical crime. An analysis of the language of the two indictments will clearly demonstrate this point.

State Court Indictment	*Federal Court Indictment*
1) "intent to deprive and defraud another of property."	1) "devise . . . a scheme and artifice to defraud and to obtain money and property . . . from E. L. Bruce Co."
2) "and to appropriate the same to his own use."	2) "and for his own use, benefit and unjust enrichment."
3) "stole property from E. L. Bruce Co."	3) "without authorization of Bruce and for his own use . . . to be transferred to . . . corporations under its sole and complete control."

Nor can there be any dispute that both indictments charge the same defendant with misappropriating the identical funds during the identical period of time from the identical victim.

In *People* v. *Katz*, 209 N. Y. 311, 325, 103 N. E. 305 (1913), the Court gave the following definition of Section 1290 of the Penal Law, under which the defendant is indicted:

> "[Section 1290] embraces every act which was larceny at common law besides other offenses which were formerly indictable as false pretenses or embezzlement. And the common-law offense has been held to be established by proof showing that the defendant obtained possession of the property by some trick, fraudulent device or artifice with felonious intent."

The petitioner has pleaded guilty to Count 1 of the Federal indictment which charges a violation of Title 18, U. S. C. §1343. For the Court's convenience, here is the language of Title 18, U. S. C. §1343 with the same words appearing in the definition of larceny in *People* v. *Katz*, *supra*, italicized:

> "Whoever having devised or intending to devise any scheme or *artifice* to defraud, or for *obtaining* money or *property* by means of false or fraudulent *pretenses*, representations, or promises . . ."

The essential elements of proof under Count 1 of the Federal indictment are identical with those of the instant indictment. In *People* v. *Elhage*, 14 A. D. 2d 986, 222 N. Y. S. 2d 65 (1961), the Court held (at p. 986):

> "A conviction for larceny requires proof of '* * * intent to deprive or defraud another of the use and benefit of [his] property.' (Section 1290 Penal Law.)"

In *Beck* v. *United States,* 305 F. 2d 595 (10th Cir. 1962), cert. den. 371 U. S. 890, 83 S. Ct. 186 (1962) the Court held (at p. 598):

> "In this case there were two essential elements of proof for the government to meet in making a submissible case, (1) the existence of a scheme or artifice to defraud or the obtaining of money by means of false pretenses, representations or promises, . . ."

See also:

Pereira v. *United States,* 347 U. S. 1, 74 S. Ct. 358 (1954);

Dranow v. *United States,* 307 F. 2d 545 (8th Cir. 1962).

Although these cases involved prosecutions under the mail fraud statute (18 U. S. C. §1341), that statute is identical with the fraud by wire statute (18 U. S. C. §1343) involved herein, except that the former requires the use of the mails whereas the latter requires the use of wire transmission. Nevertheless, the two statutes must be construed *in pari materia, United States* v. *Freeling,* 31 F. R. D. 540 (D. C. SDNY, 1962), and the element of fraud is essential to prosecutions brought under either section. *Huff* v. *United States,* 301 F. 2d 760, 765 (5th Cir. 1962).

Again it must be stressed that the fraud alleged in the Federal indictment was the unauthorized withdrawal by petitioner of $1,953,000 from Bruce and proof of the fraud would have been established by the checks which serve as the basis of the State indictment. (See affidavit of Assistant United States Attorney Michael Armstrong.) It is respectfully submitted that the charge of fraud in the

Federal indictment and the charge of larceny in the State indictment are identical.

In the Courts below, respondents relied on several decisions, particularly *United States* v. *Bagdasian,* 291 F. 2d 163 (4th Cir. 1961), which held that the fact that a defendant converted monies to his own use was not an essential part of the crime of devising a scheme to defraud. The Court in *Bagdasian, supra,* did not hold, however, that such evidence might not be essential or might not be offered by the Government in proving its case. Indeed, in a later case, the same Court which decided *Bagdasian, supra,* held in *United States* v. *Painter,* 314 F. 2d 939 (4th Cir. 1963), cert. den. 374 U. S. 831 (1963), a prosecution under Title 18 U. S. C. §1343, that "evidence of such misappropriation is clearly relevant and admissible."

It cannot be disputed that petitioner's acts of making unauthorized withdrawals from Bruce, though violative of more than one statute, were inseparable and a trial of the State indictment would now place petitioner in double jeopardy.

Mr. Justice Brennan in a separate opinion in *Abbate* v. *United States,* 359 U. S. 187, 79 S. Ct. 666 (1959), stated (at p. 197):

> "• • • I think it is clear that successive federal prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment even though brought under federal statutes requiring different evidence and protecting different federal interests."

This Court should extend the double jeopardy provisions of the Fifth Amendment to a successive State prose-

cution following a Federal prosecution where, as here, such State prosecution is of the same person based on the same acts.

In arguing against petitioner's claim of double jeopardy in the Court below, respondents relied on the decision of this Court in *Blockburger* v. *United States,* 284 U. S. 299, 52 S. Ct. 180 (1932). In *Blockburger, supra,* the Court held (at p. 304):

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

Respondents contended below that the use of interstate wires necessary under the Federal statute required proof of an additional fact not necessary in the State prosecution. This argument is without merit in light of the decision of the New York Court of Appeals in *People* v. *LoCicero,* 14 N. Y. 2d 374, 251 N. Y. S. 2d 953, 200 N. E. 2d 622 (1964), where the Court held that proof necessary to establish Federal jurisdiction does not diminish the identity of offenses. The Court held in *LoCicero, supra,* at 14 N. Y. 2d 379:

> "The additional element of obstruction of interstate commerce necessarily present in the Federal indictment, does not diminish the substantial identity of the two charges. (*People ex rel. Liss* v. *Superintendent,* 282 N. Y. 115, 25 N. E. 2d 869; *People* v. *Mangano,*

269 App. Div. 954, 57 N. Y. S. 2d 891, aff'd 296 N. Y. 1011, 73 N. E. 2d 583, 25 N. Y. S. 2d 247, supra.)"

Thus, it is well established by the highest court of New York, that the additional element of transmission by wire in interstate or foreign commerce found in Count 1 of the Federal indictment (18 U. S. C. §1343) does not diminish the identity of the Federal charge with the charge of larceny (Section 1290 of the New York Penal Law) found in the State indictment.

Although petitioner is still awaiting sentence on his plea of guilty in the Federal Court, it is respectfully submitted that his plea entitles him to raise the claim of double jeopardy. In *People ex rel. Hubert* v. *Kaiser,* 206 N. Y. 46, 99 N. E. 195 (1912), the Court held (at p. 52):

> "The record produced showed that he had withdrawn his plea of not guilty and pleaded guilty, and continued to stand at the bar of the Court upon that plea. That was as effective, as if there had been a conviction by the verdict of a jury, and, if not withdrawn, required the court to pronounce judgment."

In *People ex rel. Hunt* v. *Warden of New York City Prison,* 107 N. Y. S. 2d 136, aff'd 110 N. Y. S. 2d 918 (1952), the Court held (at p. 142):

> "Even though no judgment is rendered upon a conviction so obtained, it may be pleaded as a former conviction upon an indictment for the same offense."

Therefore, in accordance with these holdings of the New York Courts, it is submitted that petitioner's plea of guilty to Count 1 of the Federal indictment is a conviction and may be pleaded as such.

Petitioner's conviction in the Federal Court arises out of the same acts upon which the State prosecution is based. To subject petitioner to a trial of the State indictment would be a deprivation of his constitutional right that no person shall be twice placed in jeopardy.

The questions raised by this case are of great significance in the field of constitutional law. This Court will soon determine whether or not the Fifth Amendment bars successive State prosecutions for the same offense. The issue raised in the instant petition, whether the Fifth Amendment bars a subsequent State prosecution following a Federal prosecution for the same offense, is one which is peculiarly appropriate for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1966

No. 272

EDWARD M. GILBERT,

Petitioner,

against

SUPREME COURT OF THE STATE OF NEW YORK, CRIMINAL TERM, COUNTY OF NEW YORK, THE SEVERAL JUDGES THEREOF, INDIVIDUALLY AND AS JUDGES OF THE SAID SUPREME COURT, CRIMINAL TERM, COUNTY OF NEW YORK, and FRANK S. HOGAN, DISTRICT ATTORNEY, COUNTY OF NEW YORK, AND HIS REPRESENTATIVES,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the Supreme Court of the State of New York, denying the motion to dismiss the indictment on the grounds of double jeopardy, is reported at 44 Misc. 2d 318.

The Appellate Division of the New York Supreme Court, First Department, denied an article 78 proceeding in the nature of prohibition without opinion.

The New York Court of Appeals affirmed the order of the Appellate Division without opinion.

Statutory and Constitutional Provisions Involved

United States Constitution, Amend. V:

> "* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *"

Title 18 U. S. C. §1343. Fraud by wire, radio or television.

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Penal Law §1290 (State):

> "A person who, with the intent to deprive or defraud another of the use and benefit of property or to appropriate the same to the use of the taker, or of any other person other than the true owner, wrongfully takes, obtains or withholds, by any means whatever, from the possession of the true owner or of any other

person any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind, steals such property and is guilty of larceny.

"Hereafter it shall be immaterial in, and no defense to, a prosecution for larceny that:

"1. The accused obtained possession of, or title to, such property with the consent of the person from whom he obtained it, provided he induced such consent by a false or fraudulent representation, pretense, token, or writing; or

"2. The accused in the first instance obtained possession of, or title to, such property lawfully, provided he subsequently wrongfully withheld or appropriated such property to his own use or the use of any person not entitled to the use and benefit of such property; or

"3. The person from whom the accused obtained such property intended to part with title to, as well as possession of, such property, or with possession as well as title."

Penal Law §1294 (State): Grand Larceny in first degree.

"A person is guilty of grand larceny in the first degree, who steals, or unlawfully obtains or appropriates, in any manner specified in this article:

"Subd. 3

"Property of the value of more than five hundred dollars, in any manner whatever."

New York State Constitution, Article I, Section 6:

"No person shall be subject to be twice put in jeopardy of the same offense."

Penal Law §33 (State): Foreign conviction or acquittal a defense.

> "Whenever it appears upon the trial of an indictment, that the offense was committed in another state or country, or under such circumstances that the courts of this state or government had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits upon a criminal prosecution under the laws of such state, or country, founded upon the act or omission in respect to which he is upon trial, such former acquittal or conviction is a sufficient defense."

Code of Criminal Procedure §139 (State): Conviction or acquittal in another state, a bar, where the jurisdiction is concurrent.

> "When an act charged as a crime is within the jurisdiction of another state, territory or country, as well as within the jurisdiction of this state, a conviction or acquittal thereof in the former, is a bar to a prosecution or indictment therefor in this state."

Question Presented

Does the Fifth Amendment bar against double jeopardy apply where successive state and federal prosecutions are maintained for crimes dissimilar in law and fact?

Statement

A. Prior Proceedings

On June 28, 1962, a fifteen-count indictment was filed against the petitioner in the United States District Court for the Southern District of New York relating to the misappropriation of corporate funds and violations of Securities laws (13-19).*

On July 9, 1962, a New York County grand jury indicted Gilbert for twelve counts of grand larceny in the first degree [Penal Law §1294] (20-5).

On October 9, 1962, Gilbert pleaded not guilty to both indictments. However, on September 25, 1964, he withdrew his plea of not guilty to the federal charge, and entered a plea of guilty to counts 1, 5 and 7. Count 1 of the federal indictment, the count relevant to this case, charged the petitioner with a violation of 18 U. S. C. 1343, Fraud by Wire, Radio or Television. Gilbert is currently awaiting sentence on that plea.

On October 9, 1964, petitioner entered the additional plea in the New York Supreme Court of not guilty by reason of previous conviction. Subsequently, petitioner moved in the State Supreme Court to dismiss the indictment under Section 139 of the Code of Criminal Procedure and Section 33 of the Penal Law, both sections prohibiting a defendant from being twice put in jeopardy. That mo-

* References, unless otherwise indicated, are to the printed record on appeal.

tion was denied on November 6, 1964, pursuant to an opinion delivered by Justice Dickens (26-34; 44 Misc. 2d 318).

Thereafter, Gilbert applied to the Appellate Division pursuant to Article 78 of the Civil Practice Laws and Rules for an order prohibiting the respondents from prosecuting the petitioner for grand larceny in the first degree. The application was denied on April 13, 1965 (3-4) and the New York Court of Appeals affirmed the denial on March 31, 1966.

B. The Facts

In the latter part of 1961, the petitioner was President of E. L. Bruce Company, Inc. (7). At that time, Bruce decided to acquire the Celotex Corporation, and Gilbert personally began to purchase a large number of Celotex shares through his own wholly-owned corporation, Rhodes Enterprises, Inc., Bruce being given an option to buy the Celotex shares for the same price paid by Gilbert (7).

On May 28, 1962, the stock market "suffered a severe break" (7). Beset with margin calls and the possibility of being sold out if the calls were not met, Gilbert decided "the only chance of preserving the situation seemed to lay in withdrawing monies from Bruce to meet these margin calls" (7-8). Consequently, between May 28 and June 6, 1962, the petitioner made unauthorized withdrawals of $1,958,000 by drawing checks on the account of Bruce and depositing the funds in the account of either Rhodes or

Empire Hardwood Flooring Corporation (8, 37-8). The dates, amounts, and payees, of these checks are as follows:

Check #	*Date*	*Amount*	*Payee*
256	May 28, 1962	$50,000	Rhodes Enterprises, Inc.
257	May 29, 1962	$200,000	Empire Hardwood Flooring Corp.
258	May 29, 1962	$205,000	Empire Hardwood Flooring Corp.
2146	May 29, 1962	$340,000	Rhodes Enterprises, Inc.
2151	June 1, 1962	$490,000	Rhodes Enterprises, Inc.
2163	June 1, 1962	$126,000	Rhodes Enterprises, Inc.
2168	June 5, 1962	$100,000	Rhodes Enterprises, Inc.
2170	June 6, 1962	$160,000	Rhodes Enterprises, Inc.
2174	June 6, 1962	$287,000	Rhodes Enterprises, Inc.

All of these checks cleared the banks and were charged against the account of E. L. Bruce Company (38).

After credit balances has been thus established in the accounts of Rhodes and Empire Hardwood, Gilbert used all the money, with the exception of $5,000 returned to Bruce, to meet margin calls or pay other obligations (8, 38). A chart of the checks drawn, the amounts, and the payees appears in the affidavit of Jerome Kidder in the record on appeal (39-40). One of these payments was made by cable on May 29, 1962, to Financiere DuMont-Blanc in Geneva, Switzerland, this transaction in foreign commerce being the basis of the wire fraud charge appearing in Count 1 of the federal indictment (14).

POINT I

By his plea of guilty to the crime of wire fraud in federal court, prosecution of the petitioner in New York for the crime of larceny is not barred on the grounds of former jeopardy [answering petitioner's brief].

During the months of May and June, 1962, the petitioner misappropriated almost two million dollars from two corporations and used the money to satisfy creditors' claims upon him, the petitioner paying his debts in at least one instance by cabling funds to a foreign concern in Geneva. Subsequently indicted by both federal and state authorities, Gilbert pleaded guilty in federal court to the crime of wire fraud [18 U. S. C. 1343], thereby acknowledging that he used interstate or foreign wire facilities to transmit funds acquired by a scheme to defraud. By an article 78 proceeding in the nature of prohibition, the petitioner sought to abort prosecution in New York for larceny of the money, raising in defense a claim of double jeopardy.

Of course, there is at present no constitutional bar to successive state and federal prosecutions for the same crime [*Bartkus* v. *Illinois*, 359 U. S. 121 (1959)]. And while this Court has granted certiorari in *Cichos* v. *Indiana* [—— U. S. ——, 86 S. Ct. 1270 (1966)] to reconsider *Bartkus*, the outcome of *Cichos* can have no bearing on the present case. For New York has its own "barring" statute [Code Crim. Proc. §139] which grants protection from prosecution by two sovereigns fully as extensive as the

Fifth Amendment bar applied in federal courts. And under both New York and federal law it is quite apparent that larceny and wire fraud are legally and factually dissimilar.

Indeed, several indistinguishable cases confirm that successive prosecutions for wire fraud and larceny are proper. In *Commonwealth* v. *Ponzi* [152 N. E. 307, 256 Mass. 159 (1926)] the defendant pleaded guilty in federal court to mail fraud [18 U. S. C. 1341], an analogous statute requiring a scheme to defraud and use of mails instead of wires. State prosecution for larceny of the same funds involved in the scheme was allowed despite a plea of former jeopardy. In *Dunham* v. *United States* [125 F. 2d 895 (5th Cir. 1942)] an acquittal in state court for embezzlement was held to be no bar to subsequent federal prosecution for mail fraud. In *United States* v. *Sutton* [245 F. Supp. 357 (D. C. Md. 1965)] federal prosecution for transporting falsely-made money orders across state lines was deemed permissible after an acquittal in state court for larceny of the same money orders. And in *People* v. *Adamchesky* [184 Misc. 769 (Gen. Sess. N. Y. Co. 1945)] a defendant pleaded guilty in federal court to transporting stolen property across interstate lines. His plea of former jeopardy to a prosecution in New York for larceny of that property was rejected, the two crimes being held to be dissimilar in law.

Apart from principles of *stare decisis,* examination of the law of double jeopardy reveals clearly that these holdings were correctly founded. As a starting point, the United States Constitution and the Constitution of New York State both decree that a man may not be tried twice for the same "offense" [U. S. Const. Amend.

V; New York Const. Art. I, Sec. 6]. Section 33 of the Penal Law, however, establishes the plea of former jeopardy as a valid defense in a second trial for the same "offense" or "act." And New York's "barring" statute [Code Crim. Proc. §139] prohibits prosecution based on a former trial for the same "act charged as a crime." Additionally, the opinions of the Court of Appeals in the recent case of *Matter of Martinis* v. *Supreme Court* [15 N. Y. 2d 240 (1965)] discuss double jeopardy in terms of the "offense" [opinion of Judge Dye, *id.* p. 249], "acts" [opinion of Judge Fuld, *id.* p. 252; opinion of Judge Burke, *id.* pp. 251-2], and "evidence" [opinion of Judge Burke, *id.* p. 252]. Consequently, it becomes necessary to discover the relationship between the offense, acts, and evidence, especially in view of petitioner's assertion that there are "only two tests" applicable to the issue of double jeopardy: the "same acts" test and the "same evidence" test (brief, p. 8).

Analysis shows, however, that these three standards are in reality aspects of one test of double jeopardy.

Essentially double jeopardy is a behavioral concept in that identical actions, denominated different crimes, cannot be consecutively punished. Yet an action-complex may contain severable acts, each of which is a separate crime subject to separate punishment. Therefore the statutory description of the acts constituting the offense is an indispensable consideration in the determination. Usually, the test is phrased in terms of whether there occurred a "single inseparable act" or "separate and distinct acts" violating more than one statute [*e.g., People*

ex rel. Maurer v. *Jackson,* 2 N. Y. 2d 259, 264 (1957)]. If the former, the defense of double jeopardy would be sustained; if the latter, it would not. Obviously, then, the real question becomes what is an "act," for conduct may be logically subdivided into any number of component parts in much the same way as physical matter may be viewed as a combination of molecules, or elements, or atoms, depending on the observer's point of view. Clearly, some subdivisions of human conduct are relevant to the criminal law and some are not. But only the criminal statute which defines the relevant acts can decide this question. For instance, at common law, burglary and the larceny following the entry were viewed as one single act, open to only one prosecution and one punishment. But in defining criminal offenses, legislatures have resolved that transaction into two crimes, and thus into two relevant acts, each of which became subject to prosecution [see, *People* v. *Snyder,* 241 N. Y. 81 (1925); *Morgan* v. *Devine,* 237 U. S. 632 (1915); also see, *Ebeling* v. *Morgan,* 237 U. S. 625 (1915)]. Consequently, without reference to the offense involved, the same act "test" is virtually meaningless, for otherwise there is no way of telling whether a transaction is one "act," or whether a single transaction may be divided into legally separate "acts." This is not to say, however, that the language of the statutes is completely decisive of a double jeopardy claim, for, under some circumstances, two different offenses may be completely satisfied by one action. For example, in *People* v. *LoCicero* [14 N. Y. 2d 374 (1964)] the defense of double jeopardy was sustained where the statutory language of the two offenses was different, but where the act of robbing a truck itself resulted in obstructing interstate commerce.

Thus, the act and the offense are mutually complementary aspects utilized to determine double jeopardy, and not exclusive categories as implied by petitioner. Indeed, in *Matter of Martinis* the opinion of Judge Dye pointed out that there is no "conflict of meaning as to double jeopardy 'for the same offense' * * * and the 'same act or omission'" [15 N. Y. 2d 240, 249, *supra*]. The same evidence "test", furthermore, is simply another cooperating factor involved in the determination, for as the offense defines the acts which constitute the crime, by the same token it also suggests the proof that will satisfy the statute. Of course, use of the same evidence test implies that only the evidence essential to meet the elements of the statute will be considered in determining double jeopardy, for obviously the same evidence presented at a trial may describe two separate crimes, such as burglary and an ensuing larceny.

Thus, combining the factors of offense, act, and evidence, a test of double jeopardy has been expressed as follows:

> "The test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not" [*Blockburger* v. *United States,* 284 U. S. 299, 302 (1932)].
>
> "A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution or punishment under the other" [*Gavieres* v. *United States,* 220 U. S. 338, 342 (1911); also see *Pereira* v. *United States,* 347 U. S. 1,

9 (1954); *People* v. *Skarczewski*, 178 Misc. 160 (Monroe Co. 1941), aff'd, 287 N. Y. 826 (1942)].

It may be noticed, however, that the view in New York, manifested particularly in *LoCicero*, may perhaps necessitate a subtle but important change in this definition. Although double jeopardy would have also attached under the Supreme Court standard, only one of the statutes involved requiring an additional fact, this Court concentrated its attention solely on the acts committed, deeming unimportant the additional "fact" that the hijacked truck had to be in interstate commerce to satisfy the federal crime. Thus, *LoCicero* may now make it necessary for each statute to require proof of an additional "act," rather than an additional "fact," which the other does not, for a finding of dissimilarity.

The crux of the problem is simply an exploration of the essential nature of dissimilarity. For, regardless of the formulae employed or the tests variously labelled, it is apparent that the courts are seeking a fair solution which would bar multiple prosecution or punishment for crimes sufficiently similar to be legally the same. No problem occurs when the identity is complete, as there is no problem when no features are held in common. Between these poles, however, the difficulties abound. A simple and logical description of similarity would hold to be substantially identical those crimes with elements in common if only one of them has a unique additional element. These are, in effect, the "lesser included crimes" where the greater wholly encompasses the lesser, but requires proof of an additional element, and prosecution for either bars subsequent jeopardy for the other. However, where each of

the crimes has an essential element not shared by the other, they may be said to be distinct, despite other elements they may share. Thus separated by their distinctive aspects, they are sufficiently dissimilar to be different crimes, separately subject to prosecution.

In the present case, analysis of the statutes makes it quite clear that the federal and state laws involved are entirely distinct, each one requiring proof of an act or element not necessary to sustain the other. Clearly, the federal crime of wire fraud requires no proof of caption or asportation. In *United States* v. *Bagdasian* [291 F. 2d 163 (4th Cir. 1961)] the court noted:

> "As to the indictment, it was pointed out preliminarily that it does not allege that the defendant converted to his own use, but the short answer is that it is not an essential part of the crime of devising a fraudulent scheme and using interstate wire facilities for the purpose of executing such scheme" [*id.* at 164; also see, *United States* v. *Painter,* 314 F. 2d 939 (4th Cir. 1963)].

Indeed, even if the scheme were unsuccessful and the larceny never occurred, a conviction could have been obtained under the federal statute [*Huff* v. *United States,* 301 F. 2d 760, 765 (5th Cir. 1962); *United States* v. *Whiting,* 308 F. 2d 537 (2d Cir. 1962), cert. den. 372 U. S. 909 (1962)]. Conversely, to prove an actual larceny, it is not necessary to show either of the two elements required by the federal statute: a scheme to defraud and use of interstate or foreign wire facilities [Penal Law §1290].

Moreover, the factual circumstances of the present case show just as clearly that the two crimes are dissimilar.

Gilbert, by making unauthorized withdrawals of funds and depositing them in his own account, committed larceny. At that point he became subject to state prosecution, but he did not violate the federal law. Federal jurisdiction attached later, when Gilbert used the wires to send the stolen money to a European concern. This means of disposing of the loot, crucial to the federal crime, was legally and factually inessential to the state crime of stealing [*People* v. *Adamchesky,* 184 Misc. 769, *supra; United States* v. *Sutton,* 245 F. Supp. 357, *supra*].

Nevertheless, the petitioner claims that the two crimes are really one, arguing that the use of the wires is merely a jurisdictional handle irrelevant to the nexus of the crime, and that devising a scheme to defraud is substantially identical to larceny. He is, however, mistaken on both accounts. While at first glance *People* v. *LoCicero* [14 N. Y. 2d 374, *supra*] seems to offer some support for his assertion, a closer inspection shows that the present case is entirely distinguishable. In *LoCicero* the defendant was acquitted in Federal Court for obstructing interstate commerce, the result of robbing a truck. Nevertheless, the fact that the federal statute required interstate transportation and the state crime did not was disregarded by the Court of Appeals. Instead, the Court found that the same act of holding up the truck was the essential feature of both the state and federal charges, the robbery itself constituting the obstruction. The additional element that the truck was in interstate commerce "does not diminish the substantial identity of the two charges" [*id.* at 379]. However, in *LoCicero* the element of interstate transportation was purely incidental to the act done by the de-

fendant, being solely a jurisdictional fact required for federal prosecution. Here, however, while it may be similarly incidental that the wires used by the defendant were interstate facilities, the use of the wires itself is still a crucial element in the crime. Indeed, the use of wires is an additional affirmative act done by the defendant, and a *sine qua non* for committing the federal violation. Thus, the jurisdictional handle here is not the act of using the wires, but the fact that the wires were in interstate or foreign commerce. In other words, if the state crime involved in the present case were larceny by wire, the fact that an interstate wire was used would not diminish the substantial identity of the charges, *LoCicero* becoming appropriate. But obviously the state crime of larceny does not require that wires be used at all.

Moreover, there is also a lack of similarity between devising a scheme to defraud and larceny. Devising the plan is only a step, and not always a necessary step, in preparation for larceny. The act of devising therefore is not essential to prove the state crime, in the same way as larceny is not essential to prove the formulation of a scheme. Rather, devising the plan is closely analogous to a conspiracy to commit larceny, a crime open to separate prosecution and punishment beyond the larceny itself [*People* v. *Tavormina*, 257 N. Y. 84 (1931); *People* v. *Palmisano*, 132 Misc. 244 (Mag. Ct., Kings Co., 1928)].

Nevertheless, insisting that devising a scheme to defraud and larceny are substantially the same, the petitioner cites the fact that the federal indictment mentioned

the larceny, and presumably would have offered evidence of larceny had the case gone to trial, and reasons that the "same evidence test" makes the crimes one. However, the fact that the larceny was pleaded in the federal indictment does not render it an essential element of wire fraud, for the statute and authorities show it is not [*United States* v. *Bagdasian,* 291 F. 2d 163, *supra; United States* v. *Painter,* 314 F. 2d 939 (4th Cir. 1963)]. Indeed, even if the federal prosecutor erroneously thought it was essential, the test for double jeopardy purposes is not controlled by the theory of the pleader, but by the requirements of the statute [*People* v. *Silverman,* 281 N. Y. 457, 462 (1939)]. At any rate, its presence in the federal charge and its use on a trial would be well advised, since proof of larceny is, of course, both relevant and admissible evidence relating to the crime of wire fraud, the taking of property being probative to show the devising of a scheme to take it, as well as showing the criminal intent underlying the scheme. [*United States* v. *Crosby,* 294 F. 2d 928, 947 (2d Cir. 1961); *United States* v. *Painter,* 314 F. 2d 939, 942 n. 5, *supra*]. Thus, while the same larcenous act was charged in both indictments, proof of it is essential only to the state crime, its use in the federal prosecution being unrequired but helpful. The same evidence standard, of course, is limited to the same evidence essential to prove the crimes, and can not operate to make offenses identical where its use on one trial is only corroborative or probative.

Still, petitioner argues that the whole transaction—the devising of a scheme and the larceny and the use of the wires—is one inseparable act, claiming that the continuing

criminal intent binds the two aspects together for double jeopardy purposes. Further, he regards criminal intent itself as essential to both crimes, and views the offenses identical on that ground also. It should be remembered, however, that it is not relevant that the larceny and the devising of a scheme to defraud may have been part of the same over-all transaction. As stated in *People ex rel. Mauer* v. *Jackson* [2 N. Y. 2d 259 (1957)]:

> "It is clear that if separate and distinct acts were committed, and that they violated more than one section of the Penal Law, punishment for each of them would be proper although they arose out of a single transaction" [*id.* at 264].

The relevant statutes, of course, define whether the transaction is one "act" or several. Here, the existing laws proscribe separate steps in the transaction, the state law prohibiting the taking of the property, while the federal law bans the devising of the scheme and use of the wires to dispose of it.

The aspect of continuing criminal intent, moreover, certainly does not bind two separable acts together for double jeopardy purposes. Manifestly, the same criminal intent joins a burglary and larceny committed during one transaction, but both this Court and the New York Court of Appeals have held permissible successive prosecution or punishment for both crimes [*People* v. *Snyder,* 241 N. Y. 81, *supra; Morgan* v. *Devine,* 237 U. S. 632 (1915)]. Indeed, in *Morgan* v. *Devine,* the Supreme Court considered the argument now advanced by petitioner, and decided that a continuous and similar intent is irrelevant to whether the acts were separate or one.

"But the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable" [237 U. S. at 640, *supra;* also see, *United States* v. *Dougherty,* 269 U. S. 360 (1926)].

In *United States* v. *Sutton* [245 F. Supp. 357 (D. C. Md. 1965)] petitioner's argument was recently raised and similarly rejected, the court deciding that a federal prosecution for transporting falsely-made money orders across state lines was permissible following an acquittal in State court for larceny of those funds. Many other cases also exist in which a continuous criminal intent was implicitly deemed irrelevant to the double jeopardy claim [see, *Ebeling* v. *Morgan,* 237 U. S. 625 (1915)—separate punishments for cutting of several mail bags at the same time and place; *Hoag* v. *New Jersey,* 356 U. S. 464, 467 (1958)—separate convictions for each of four robberies committed at the same time; *United States* v. *Michener,* 331 U. S. 789 (1946)—separate punishment for making counterfeit plates and possessing those plates with intent to use them; *United States* v. *Adams,* 281 U. S. 202 (1930)—separate prosecution for making false entries in books of a bank to show a credit, and then for making false entries in a report to show the same credit]. Indeed, even in *People* v. *LoCicero,* this Court held that the kidnaping of the driver of the hijacked truck was not barred from prosecution [14 N. Y. 2d at 379, *supra*], though presumably the same criminal intent that underlay the robbery motivated the internment of the victim.

In summary, then, it is quite clear that this larceny prosecution in New York is not barred on the grounds of

double jeopardy. Manifestly, the statutes are different, each having elements which the other does not. Similarly, the act and evidence of larceny is not essential to satisfy the Federal statute, nor are the acts or evidence essential to prove devising a scheme to defraud or use of wire facilities required to show a criminal caption and asportation.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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